



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 249 and 252

[Docket DARS-2019-0060]

RIN 0750-AK56

Defense Federal Acquisition Regulation Supplement: Modification of DFARS Clause "Notification of Anticipated Contract Termination or Reduction" (DFARS Case 2019-D019)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to update legal and DFARS citations in an existing DFARS clause, conform the clause text to the current DFARS convention regarding the use of dollar thresholds in contract clauses, and remove clause text that is no longer needed to implement the underlying statutory language.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2019-D019, using any of the following methods:

o *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for "DFARS Case 2018-D019." Select "Comment Now" and follow the instructions to submit a comment. Please include "DFARS Case 2019-D019" on any attached documents.

o *Email:* osd.dfars@mail.mil. Include DFARS Case 2019-D019 in the subject line of the message.

o *Fax:* 571-372-6094.

o *Mail:* Defense Acquisition Regulations System, Attn: Carrie Moore, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571-372-6093.

SUPPLEMENTARY INFORMATION:

I. Background

Within the DFARS, statutory acquisition-related dollar thresholds that are subject to inflation adjustment under 41 U.S.C. 1908 are identified in the applicable DFARS policy section. Any clause that relies on such a threshold will

reference the threshold in the applicable DFARS policy section, instead of citing the actual dollar value. This drafting convention ensures that inflation adjustments of statutory acquisition-related thresholds apply to existing contracts and subcontracts in effect on the date of the adjustment.

To conform to this drafting convention, this rule proposes to modify the DFARS subpart 249.70 to add the pertinent dollar thresholds of 10 U.S.C. 2501 note, Notice to Contractors and Employees Upon Proposed Termination or Substantial Reduction in Major Defense Programs, and modify DFARS clause 252.249-7002, Notification of Anticipated Contract Termination or Reduction, to add references to the statutory thresholds cited at DFARS subpart 249.70.

In addition, DFARS clause 252.249-7002 advises contractors of the benefits that may be available to affected employees through the Job Training Partnership Act (29 U.S.C. 1661 and 1662; Pub. L. 97-300). The Job Training and Partnership Act was repealed and superseded by the Workforce Investment Partnership Act (29 U.S.C. Chapter 30; Pub. L. 105-220), which was later repealed and superseded by the Workforce Innovation and Opportunity Act (29 U.S.C. Chapter 32; Pub. L. 113-128). This rule proposes to modify DFARS clause 252.249-7002 to reflect the current statute associated with the 10 U.S.C. 2501 note and make other conforming changes.

II. Discussion and Analysis

DFARS clause 252.249-7002 is included in all contracts under a major defense program and implements the requirements of 10 U.S.C. 2501 note. The 10 U.S.C. 2501 note requires contractors, upon receiving notice of contract termination or a substantial reduction in funding resulting from an appropriations act, to provide notice of the anticipated termination or substantial reduction to first-tier subcontractors with a subcontract of \$700,000 or more, and flow down the notification to lower-tier subcontractors with a subcontract of \$150,000 or more. To implement the dollar thresholds of the 10 U.S.C. 2501 note in accordance with the current DFARS drafting convention, the rule adds the relevant dollar thresholds in DFARS 249.7003, and updates the clause text to refer to the thresholds added to DFARS 249.7003.

This rule also proposes to amend the DFARS clause to cite the Workforce Innovation and Opportunity Act, which is the current statute under which employee employment and training opportunities apply, and to conform the clause with the current requirements of 10 U.S.C. 2501 note. Public Law 103-160 amended 10 U.S.C. 2501 note to specify which services under title 29 of the U.S.C. an employee could be eligible for, depending on whether the termination or reduction will or will not result in plant closure or mass layoffs. This specification of available

services based on results of the notification was removed from 10 U.S.C. 2501 note by Public Law 105-277; therefore, this rule removes this delineation from the DFARS clause. In addition, the thresholds for the subcontractor notification requirements is revised to state "exceeds" in lieu of "equals or exceeds" to align with the statute.

The revision of this DFARS clause implements a recommendation from the DoD Regulatory Reform Task Force. On February 24, 2017, the President signed Executive Order (E.O.) 13777, "Enforcing the Regulatory Reform Agenda," which established a Federal policy "to alleviate unnecessary regulatory burdens" on the American people. In accordance with E.O. 13777, DoD established a Regulatory Reform Task Force to review and validate DoD regulations, including the DFARS. A public notice of the establishment of the DFARS Subgroup to the DoD Regulatory Reform Task Force, for the purpose of reviewing DFARS provisions and clauses, was published in the *Federal Register* at 82 FR 35741 on August 1, 2017, and requested public input. One public comment was received on this clause. Subsequently, the DoD Task Force reviewed the requirements of DFARS clause 252.249-7002 and determined that the clause should be modified. A summary of the comment received and the response to the respondent is provided as follows:

Comment: The respondent advised that the clause imposes administrative burden on contractors and is difficult to manage at the multi-tier level.

Response: The clause is necessary to implement the requirements of 10 U.S.C. 2501 note, which identifies notification responsibilities for DoD, as well as certain DoD contractors and their subcontractors, when funding levels in an appropriation act may result in the termination or substantial reduction of funding for contracts under a major defense program. The clause ensures contractors and subcontractors comply with the law and are aware of the benefits potentially available to their employees that are adversely affected by the termination or reduction in funds.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, including Commercially Available Off-The-Shelf Items

This proposed rule does not create any new provisions or clauses. The rule simply updates legal and DFARS citations in the clause and removes unnecessary information. This rule does not change the applicability of the affected clause, which does not apply to contracts valued at or below the SAT, or for commercial or COTS items.

IV. Executive Orders 12866 and 13563

E.O.s 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule is not creating any new requirements for contractors or changing any existing policies and practices. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to modify the text of DFARS clause 252.249-7002, Notification of Anticipated Contract Termination or Reduction, to: (1) update legal and DFARS citations in the clause; (2) remove text that is no longer necessary to implement 10 U.S.C. 2501 note; and (3) conform the clause text to the current DFARS convention for referencing dollar thresholds in a clause. The update of legal and DFARS citations is pursuant to action taken by the DoD Regulatory Reform Task Force under Executive Order 13777, Enforcing the Regulatory Reform Agenda.

The objective of this proposed rule is to provide current information to contractors and maintain consistency within the DFARS clause text.

DoD does not collect data on the number of small businesses that have been awarded contracts under a major defense programs and have also received notice of contract termination or a substantial reduction in funding resulting from an appropriations act. Due to the complexity and magnitude of major defense program contracts, the prime contracts are generally awarded to major contractors, and not to small entities. Senior DoD program acquisition officials estimate that such notification of the termination or substantial reduction in a major defense program does not occur, on the average, more than once or twice per year. However, this rule

is not expected to have a significant impact on small business entities, as it does not impose any new requirements or change any existing requirements for small business entities.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. This rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known alternatives to the rule that will meet the stated objectives of the statutes or minimize the impact on of the rule on small entities.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities. DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2019-D019) in correspondence.

VI. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however, the changes to DFARS 252.249-7002 do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 0704-0533, titled: DFARS Subpart 249 - Termination of Contracts.

List of Subjects in 48 CFR Parts 249 and 252

Government procurement.

Jennifer Lee Hawes,

*Regulatory Control Officer, Defense Acquisition Regulations
System.*

Therefore, 48 CFR parts 249 and 252 are proposed to be amended
as follows:

1. The authority citation for 48 CFR parts 249 and 252
continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 249—TERMINATION OF CONTRACTS

2. Amend section 249.7003 by—

- a. In paragraph (a), removing “Section 824” and “Job Training Partnership Act (29 U.S.C. 1661 and 1662)” and adding “section 824” and “Workforce Innovation and Opportunity Act (29 U.S.C. Chapter 32) (Pub. L. 113-128)” respectively, in their places;
- b. In paragraph (b) introductory text, removing “to:” and adding “to—” in its place;
- c. In paragraph (b) (1), removing “act.” And adding “act; and” in its place;
- d. Revising paragraph (c).

The revision reads as follows:

**249.7003 Notification of anticipated contract terminations or
reductions.**

* * * * *

(c) When subcontracts have been issued, the prime contractor is responsible for—

(1) Providing notice of the termination or substantial reduction in funding to all first-tier subcontractors with a subcontract valued equal to or greater than \$700,000; and

(2) Requiring that each subcontractor—

(i) Provide such notice to each of its subcontractors for subcontracts valued greater than \$150,000; and

(ii) Impose a similar notice and flowdown requirement in subcontracts valued greater than \$150,000 at all tiers.

3. Add section 249.7004 to read as follows:

249.7004 Contract clause.

Use the clause at 252.249-7002, Notification of Anticipated Contract Termination or Reduction, in all contracts under a major defense program.

PART 252-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Amend section 252.249-7002 by—

a. In the introductory text, removing “249.7003(c)” and adding “249.7004” in its place;

b. Removing the clause date “(MAY 2019)” and adding “(DATE)” in its place;

c. Revising paragraph (b);

- d. Redesignating the paragraph (c) introductory text and paragraphs (c) (1) through (c) (4) as paragraph (c) (1) and paragraphs (c) (1) (i) through (c) (1) (iv), respectively.
- e. Revising newly redesignated paragraph (c) (1) (iii);
- f. Adding paragraph (c) (2);
- g. In paragraph (d) (1), removing "225.870-4(c) (2) (i) (A) (1) and adding "249.7003(c) (1)" in its place;
- h. Revising paragraphs (d) (2) (i) and (d) (2) (ii); and
- i. Removing paragraph (e).

The revisions and additions read as follows:

252.249-7002 Notification of Anticipated Contract Termination or Reduction.

* * * * *

(b) *Scope.* This clause implements section 1372 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. 103-160) and section 824 of the National Defense Authorization Act for Fiscal Year 1997 (Pub. L. 104-201), which are intended to help establish benefit eligibility under the Workforce Innovation and Opportunity Act (29 U.S.C. Chapter 32) (Pub. L. 113-128) for employees of DoD contractors and subcontractors adversely affected by contract terminations or substantial reductions under major defense programs.

(c) * * *

(1) * * *

(iii) The State or entity designated by the State to carry out rapid response activities described in section 134(a)(2)(A)(i) of the Workforce Innovation and Opportunity Act (29 U.S.C. 3174(a)(2)(A)(i)); and

* * * * *

(2) The notice provided an employee under paragraph (c) of this clause shall have the same effect as a notice of termination to the employee for the purposes of determining whether such employee is eligible for training, adjustment assistance, and employment services under section Workforce Innovation and Opportunity Act (29 U.S.C. Chapter 3101) (Pub. L. 113-128).

(d) * * *

(2) * * *

(i) Provide notice to each of its subcontractors with a subcontract that exceeds the threshold specified in DFARS 249.7003(c)(2)(i) at the time of the notice; and

(ii) Impose a similar notice and flowdown requirement to subcontractors with subcontracts that exceed the threshold specified in DFARS 249.7003(c)(2)(ii) at the time of the notice.

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